

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 96-48

July 5, 1996

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Recent Developments Related to Jefferson Chemical Co.
and Peyton Packing Co. issues.

This is to bring to your attention two recent unpublished Board rulings involving litigation-bar principles under Jefferson Chemical Co.¹ and Peyton Packing Co.² The rulings offer practical guidance in an area of regular concern to Regional Offices.

The first case, Wright Electric, Inc., Cases 18-CA-12820 et al., involves Bill Johnson's Restaurant³ issues arising from an employer's state court lawsuit against the International Brotherhood of Electrical Workers (IBEW), an IBEW business agent, and a former employee [and union salt] Thomas Ouellette. The employer filed the suit after discovering in 1993 that Ouellette presented false information on his application concerning his previous employment. The lawsuit alleged breach of employment contract, breach of fiduciary duty and duty of loyalty, unjust enrichment, fraudulent misrepresentation, fraudulent concealment and wrongful use of the employer's physical facilities, vehicles and equipment. Additionally, the lawsuit alleged malicious prosecution for filing unfair labor practices charges with the Board⁴ as well as for filing unemployment compensation claims. The state court dismissed the two malicious prosecution counts.

¹ 200 NLRB 992 (1972).

² 129 NLRB 1358 (1961).

³ 461 U.S. 731 (1983).

⁴ The Region dismissed the charge alleging Ouellette's termination violated Section 8(a)(3).

The Region litigated the unfair labor practice complaint with respect to the malicious prosecution counts of the state court lawsuit although the remaining counts were still pending. At the start of the unfair labor practice hearing counsel for General Counsel moved for a declaratory ruling: that there would be no litigation bar to issuing complaint regarding the pending counts of the state court lawsuit if and when they became ripe for trial. The ALJ refused to grant the motion, reasoning that he lacked authority to bind the Board with such a determination, and counsel for General Counsel filed a special appeal.

The Board granted the special appeal on June 3, 1996, ruling:

[T]here is no reason in the instant circumstances why the unfair labor practice case cannot proceed as to those separate counts of the civil action that the consolidated [ULP] complaints allege lack any reasonable basis and that have been dismissed by the state court. The fact that some non-baseless counts are still pending before the state court should not preclude the General Counsel from proceeding with respect to other separable counts which are alleged to be baseless and have been dismissed by the state court. And, by so proceeding on the dismissed counts, the General Counsel will not be procedurally barred from proceeding in the future with respect to the now-pending counts.

The second case is Caterpillar, Inc., Case 33-CA-10444 et al., (Caterpillar II). A copy of the Board's April 15 Notice to Show Cause in Caterpillar II is attached. When the Caterpillar II trial opened in February 1995, the ALJ concluded that he did not have authority to consolidate the Caterpillar II complaints with an earlier series of complaints the General Counsel previously litigated before another ALJ in the Caterpillar I trial. The Union filed a request for special appeal, seeking a ruling that the pending complaints in Caterpillar II are not subject to dismissal under Peyton Packing Co. because they were not consolidated with the earlier Caterpillar I cases. The Employer urged that all cases pending in Caterpillar II should be consolidated with Caterpillar I, while General Counsel argued that the Board should interpret Peyton Packing Co. to permit the litigation of the cases in Caterpillar II separately from those in Caterpillar I.

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The April 15 Notice To Show Cause contains a concise summary and helpful discussion of the Board's litigation bar cases particularly as to newly filed charges and issued complaints arising during pending litigation. Counsel for the General Counsel, the Employer and the UAW have filed responses, and the matter is pending with the Board at this time. We will keep you informed of subsequent rulings or developments in this matter.

Please share this memorandum with your staff. If you have any questions concerning this matter, you may contact me or your Assistant General Counsel.

B. A. B.

Attachment

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